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No. 85-1617

IN THE

Supreme Court of the United States

October Term, 1985

Emerson Electric Co.,

Petitioner,

vs.

Janet Swenson,

Respondent.

BRIEF OF RESPONDENT A. O. SMITH CORPORATION IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MINNESOTA

FRANK J. WALZ
FRANK E. VOGL*
FREDERICK W. MORRIS
BEST & FLANAGAN
3500 IDS Center
Minneapolis, MN 55402
Tele.: (612) 339-7121
Counsel for Respondent
A. O. Smith Corporation
*Counsel of Record

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1986—Northwest Printing Co., 3010 2nd St. No., Minneapolis, MN 55411—588-7506

QUESTION PRESENTED

Respondent A. O. Smith Corporation joins with Petitioner Emerson Electric Co. in its formulation of the question presented.

LIST OF PARTIES

The parties to the proceeding in the Minnesota Supreme Court were Emerson Electric Co., A. O. Smith Corporation, Lake Region Cooperative, and Janet Swenson.

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Respondent A. O. Smith Corporation supports the Petition of Emerson Electric Co. for a writ of certiorari to review the decision of the Minnesota Supreme Court holding that Section 23 of the Consumer Product Safety Act ("CPSA") permits a private right of action for conduct that did not conform to nonbinding interpretive regulations issued by the U.S. Consumer Product Safety Commission ("CPSC").

OPINIONS BELOW

The relevant opinions by the Minnesota Supreme Court, 374 N.W.2d 690 (1985), and the Minnesota Court of Appeals, 356 N.W.2d 313, are attached as Appendices A and B, respectively, to the Petition of Emerson Electric Co.

JURISDICTION

Respondent's counsel at the trial court and throughout the appellate process in the Minnesota Courts received a service copy of the Petition on April 7, 1986. Counsel during that period was Thomas L. Athens, of the firm Arvesen, Donoho, Lundeen, Hoff, Svingen & Athens, 125 South Mill Street, Fergus Falls, Minnesota. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(3).

STATUTES AND REGULATIONS INVOLVED

Sections 15(b) and 23(a) of the CPSA, 15 U.S.C. §2064 (b) and §2702(a) and the relevant CPSC regulations, 16 C.F.R. Part 1115, are attached in pertinent part as Appendices E and F, respectively, to the Petition of Emerson Electric Co.

STATEMENT OF THE CASE

Respondent joins in the Statement of the Case in the Petition with the single addition that Respondent, in addition to Petitioner Emerson Electric Co., opposed Janet Swenson's motion in the trial court to amend her Complaint to add a private cause of action under Section 23 of the CPSA and has been a party to the appeals seeking to reverse the rulings permitting the amendment.

REASONS FOR GRANTING THE WRIT

The decision by the Minnesota Supreme Court ignores the line of legal precedents of this Court distinguishing between interpretive and legislative or substantive rules. Furthermore, it ignores the express intention of the CPSC that the interpretive rule regarding reporting under the CPSA

is to be interpretive rather than substantive and that the rule was promulgated, in part, to clarify existing confusion about whether the rule had been substantive or interpretive. On legal merits alone, the decision of the Minnesota Supreme Court is in error.

The lower court's decision also will lead inevitably to confusion and conflict in the interpretation and application of the interpretive rule by state and federal courts and by juries. Inevitably, there will be substantial conflict among the courts of this land over when and how to submit the cause of action. Furthermore, that conflict will be compounded by the confusion juries must confront in deciding how to apply the law as it is given to them. Taken together all of this will impact adversely on the state and federal courts, on the litigants, and on the manufacturers of consumer products and the liability insurance crisis they face.

I.

THE DECISION BELOW IGNORES THIS COURT'S DECISIONS REGARDING THE DISTINCTION BETWEEN INTERPRETIVE AND LEGISLATIVE RULES AND THE CPSC'S EXPRESS INTENT.

The decision by the Minnesota Supreme Court glosses over and tends to obliterate the distinction between an interpretive rule and a substantive rule, a distinction the CPSC itself understood well when it promulgated its rule describing its views of manufacturers' reporting obligations under the CPSA. *See* 43 Fed. Reg. 34,998 (1978) *codified at* 16 C.F.R. §1115.1-22 (1985). Such an obliteration is in direct contrast with and flies in the face of repeated decisions by this Court distinguishing between interpretive

and legislative rules and holding that interpretive rules operate as guideposts, in effect, as to how a particular statute will be interpreted and enforced by the appropriate government authority. *Chrysler Corp v. Brown*, 441 U.S. 281 (1979); *Batterton v. Francis*, 432 U.S. 416 (1977); *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976); *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). It also ignores the express comments of the CPSC regarding the administrative intent of the reporting guidelines. In its introduction to the rule at issue, the CPSC stated: "The Commission considered the difference between promulgating the rule as substantive or interpretive, sought public comment on the issue . . . and has decided to promulgate the rule as interpretive." 43 Fed. Reg. 34,998 (1978). In the language immediately preceding these comments, the CPSC clearly indicated it was taking this action in response to confusion over the rule and observations by commentators which "indicated that the rule was substantive in effect." Id.

The Minnesota Supreme Court has ruled so as to permit a private party to sue for damages because of an alleged violation of an interpretive rule that was promulgated by the CPSC specifically to clarify confusion concerning reporting obligations. The rule was not promulgated with any apparent intent that it would or should be used by private litigants as an anvil on which to enforce private rights. Indeed, there is no authority or suggestion that the CPSC or Congress intended such private cause of action.

Respondent supports the Petition of Emerson Electric Co. and requests this Court to grant review and to reverse the decision of the Minnesota Supreme Court by recognizing the interpretive nature of the CPSC's reporting regula-

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tion and by restricting the scope of private right of action to that expressly stated in the CPSA.

II.

THE DECISION BY THE LOWER COURT HAS IMPORTANT SOCIAL AND LEGAL IMPLICATIONS THAT WARRANT REVIEW BY THIS COURT

The decision by the Minnesota Supreme Court, in light of the widely discussed and publicized crises over the cost and availability of liability insurance, can only have harmful legal and social consequences. If permitted to stand, the decision will spawn broader and more difficult litigation issues for manufacturers of consumer products and for the courts. Furthermore, the consequences of permitting private actions for failure to comply with the CPSC's interpretive rule regarding reporting are likely to include conflicting determinations by different juries that identical conduct both violates and complies with the rule.

The liability insurance crises is a topic of almost daily debate or discussion in one forum or another. Regardless of the actual depth and breadth of the crisis, there is little question that the crisis is real. Adding to the private litigants' arsenal a cause of action against manufacturers of consumer products for failure to comply with the CPSC's interpretive rule regarding reporting can only add fuel to the flame. The new cause of action will broaden discovery, permit evidence to be introduced at trial that may well be excluded otherwise, and add the threat of damages which include attorneys' fees. As a practical matter, all of this will combine to make litigation more costly and threatening for manufacturers of consumer products and, hence,

will make the cost of liability insurance more expensive and, surely in some instances, unavailable. Whatever the current dimensions of the liability crisis, they are certainly to grow if the decision by the Minnesota Supreme Court is permitted to stand.

The lower court's decision also will lead inevitably to confusion in the minds of jurors and judges over how to decide issues raised by a private right of action under the interpretive rule. *See* Petition for Writ of Emerson Electric Co., n.8 at 12. One can easily imagine a court's difficulty in deciding whether the evidence justifies allowing the cause of action to be submitted to a jury and, even more problematical, in fashioning an appropriate instruction or instructions to a jury. Inevitably, the cause of action as it is submitted to a jury will likely have nearly as many forms as there are numbers of individual state and federal courts. Compounding this likely confusion is the confusion jurors will have trying to apply the law as it is given to them. They will be forced to speculate about what the CPSC might have done had it addressed the allleged violation of the interpretive rule.

The conflict and confusion within the products liability arena that will be engendered by the decision of the Minnesota Supreme Court will also add to the liability insurance crisis. Both the creation of such conflict and confusion as well as the resulting exacerbation of a significant and widely acknowledged social and legal crisis warrant this Court accepting review of the lower court's decision. Further litigation in the courts below is unlikely to provide any further elucidation of this issue. This Court will inevitably be called upon again to resolve this question and, indeed, must eventually resolve it. To postpone this Court's

review and decision will only serve to the detriment of the federal and state court systems as well as to the litigants who will spend enormous amounts of time, money and effort litigating claims improperly brought under the CPSA in violation of precedents of this Court and the express intention of the CPSC.

CONCLUSION

For the foregoing reasons, Respondent A. O. Smith Corporation supports the Petition for Certiorari of Emerson Electric Co. and respectfully requests that the Petition be granted.

Respectfully submitted,

FRANK J. WALZ
FRANK E. VOGL*
FREDERICK W. MORRIS
BEST & FLANAGAN
3500 IDS Center
Minneapolis, MN 55402
Tele.: (612) 339-7121
Counsel for Respondent
A. O. Smith Corporation

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